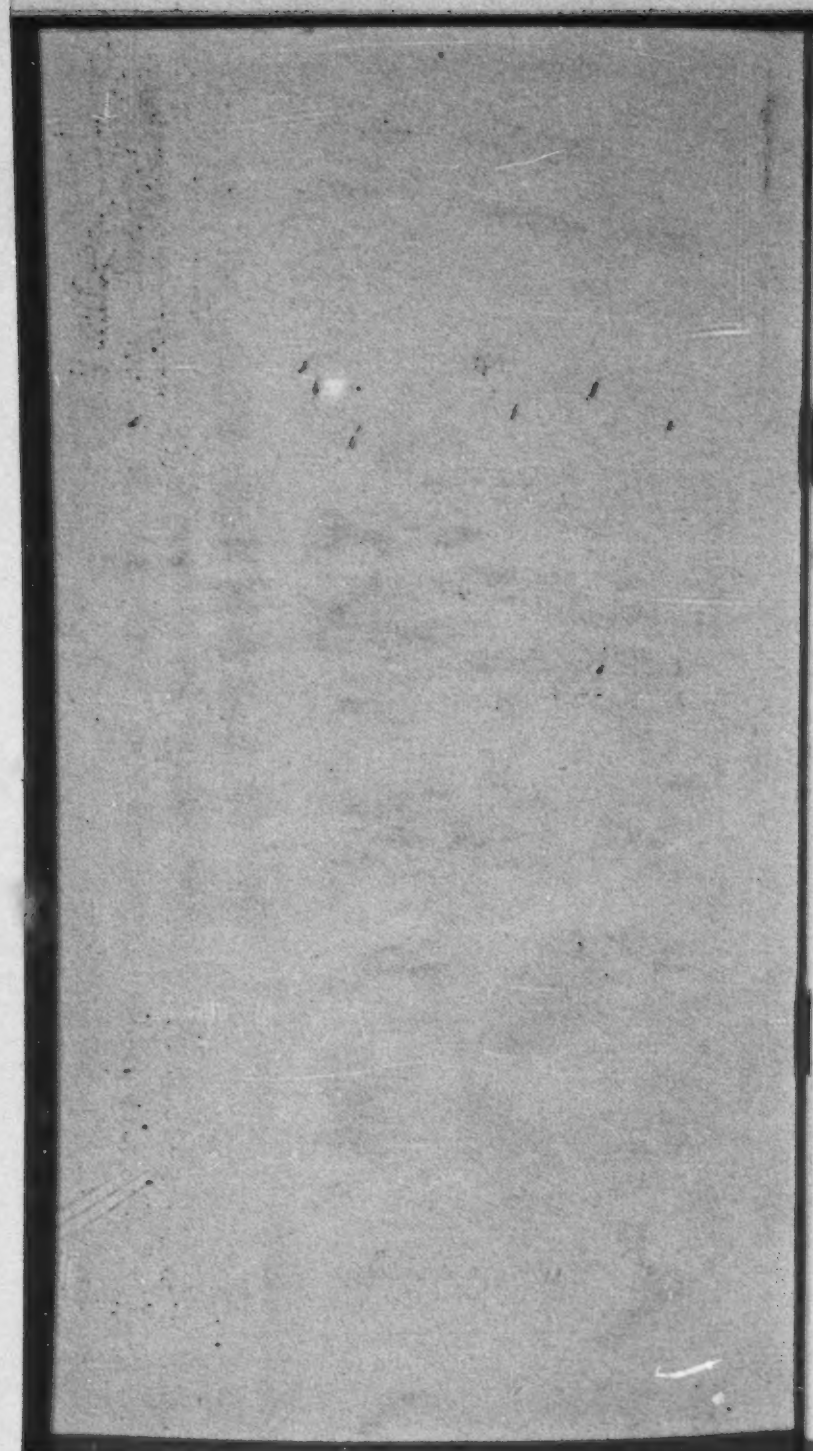

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES SELIGSON
Attorney for Respondents
767 Fifth Avenue
New York, New York 10022
(212) 753-7800

WEIL, GOTSHAL & MANGES,
MUDGE ROSE GUTHRIE ALEXANDER & MITCHELL,
HARVEY R. MILLER,
MICHAEL L. COOK,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Opinion and Orders Below	2
Jurisdiction	2
Statute Involved	3
Statement of the Case	3
ARGUMENT	
I. A Liquidating Agent Is Not a "Receiver" or "Trustee" Within the Meaning of Section 3a(5) of the Bankruptcy Act	7
II. The Legislative History and Statutory Context of Section 3a(5) of the Bankruptcy Act Establishes That an Agent Appointed to Liquidate Is Not Within the Purview of Said Section	14
III. The Petition for Certiorari Does Not Present a Question of Great Public Concern	19
IV. Section 3a(5) of the Bankruptcy Act Is Specific and Should Not Be Judicially Enlarged	21
V. No Sound Reason Exists for the Granting of the Petition for Certiorari	23
CONCLUSION	24

TABLE OF CITATIONS

PAGE

Cases:

Booth v. *Clark*, 58 U.S. (17 How.) 322, 331 (1855) 8

First National Bank v. *Flershem*, 290 U.S. 504 (1934) 17

Globe Ins. Co. v. *Cleveland Ins. Co.*, 10 Fed.Cas. 488, 492 (No. 5486) (C.C.N.D. Ohio 1876) *appeal dismissed*, 98 U.S. 366 (1879) 12

Hamilton v. *Rathbone*, 175 U.S. 414, 419 (1899) 18, 19

Handy v. *C.I.T. Corp.*, 291 Mass. 157, 197 N.E. 64 (1935) 10

In re Ambrose Matthews & Co., 299 Fed. 309 (D.N.J. 1916), *aff'd*, 236 Fed. 539 (3d Cir. 1916) 11, 12, 13

In re Bonnie Classics, Inc., 116 F.Supp. 646 (S.D.N.Y. 1953) 22

In re Burrell, 123 Fed. 414 (2d Cir. 1903) 15

In re Empire Metallic Bedstead Co., 98 Fed. 981, 982 (2d Cir. 1899) 21

In re R. V. Smith Co., 38 F.Supp. 57 (W.D. Okla. 1941) 10

In re Watts & Sachs, 190 U.S. 1 (1903) 14

Ledbetter v. *Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944) 8, 9

Lohf v. *Casey*, 330 F.Supp. 356 (D. Colorado, 1971) 20

Maplecroft Mills v. *Childs*, 226 Fed. 415 (4th Cir. 1915) 21

Rice v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) 24

PAGE

Scheuer v. *Smith & Montgomery Book & Stationery Co.*, 112 Fed. 407 (5th Cir. 1901) 15

Taylor v. *Davis' Adm'x.*, 110 U.S. 330, 334 (1884) 10

United States v. *Kras*, —— U.S. ——, 93 S.Ct. 631, 640 (1973) (concurring opinion) 22, 23

Statutes:

Bankruptcy Act

Section 2a(21), 11 U.S.C. §11a(21) 17
Section 3(a)4, 11 U.S.C. §21a(4) 11
Section 3a(5), 11 U.S.C. §21a(5) 1, 3, 15, 16, 17
Section 19, 11 U.S.C. §42 5
Section 24c, 11 U.S.C. §47c 2
Section 69d, 66 Stat. 426, 11 U.S.C. §109d 17, 18
Section 311, 11 U.S.C. §711 22
Section 321, 11 U.S.C. §721 6
Section 325, 11 U.S.C. §725 22

Securities Investors Protection Act of 1970

Section 5(b)(1)(A), 15 U.S.C. §§78eee(b)(1)(A) 19, 20

Miscellaneous:

1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1971) 21

1 Collier, Bankruptcy ¶3.501 at 496 (14th Ed. 1971) 16

Hearings on H.R. 5221 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926) 16

PAGE

Hearings pursuant to H.Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51, at 38-39 (1925) 16

High, A Treatise on the Law of Receivers, Ch. 1, §1, at 2-3 (4th Ed. 1910) 8

H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926) 15

H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926) 15

H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926) 16

H.R. Rep. No. 1409, 75th Cong., 1st Sess. 6 (1937) 17

H.R. Rep. No. 1613, 91st Cong., 2d Sess. 14 (Oct. 21, 1970) 20

H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952) 18

Restatement of Trusts 2d, §§2 and 8 and Comment a. (1959) 10

Scott, The Law of Trusts, Ch. 1, §8 (3rd Ed. 1967) 10

S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented

Is the appointment of an agent to liquidate property, who is not vested with title to the property and whose appointment does not affect the rights of creditors, the commission of an act of bankruptcy under Section 3a(5) of the Bankruptcy Act, 11 U.S.C. §21a(5)?

Opinions and Orders Below

John P. Foley, Jr., J. P. Foley & Co., Inc. and Anita Salisbury (hereinafter collectively "Foley" or "Petitioners") seek the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Court of Appeals") from the opinion and order of that court dated December 11, 1972 (Pet. App. "A" at 10).* The opinion and order of the Court of Appeals, not yet officially reported, reversed an order of the United States District Court for the Southern District of New York ("District Court"), dated March 15, 1972 (Pet. App. "B" at 25), which had confirmed an order of a referee in bankruptcy. The order of the referee sustained an involuntary petition in bankruptcy against Blair & Co., Inc. ("Blair") on the ground that a liquidating agent was the equivalent of a "receiver" or "trustee" within the context of Section 3a(5) of the Bankruptcy Act, *supra* (Pet. App. "C" at 28).

The Court of Appeals, in the majority opinion of Chief Judge Henry J. Friendly, held that, in view of the legislative history of the Bankruptcy Act, an agent appointed to liquidate was not a "receiver" or "trustee" under Section 3a(5) of the Act.

Jurisdiction

The jurisdiction of this Court is apparently invoked by Petitioners under Section 24c of the Bankruptcy Act, 11 U.S.C. § 47c, although the petition for certiorari does not so indicate.

---

* References in parentheses followed by "Pet. App." refer to Appendices "A", "B" or "C" to the petition for certiorari herein and the pages thereof.

Statute Involved

The instant petition is concerned only with the commission of an act of bankruptcy under Section 3a of the Bankruptcy Act, 11 U.S.C. § 21a. In prosecuting their involuntary petition in bankruptcy, Petitioners relied upon only one alleged act of bankruptcy. The pertinent statutory provision involved in connection therewith is Section 3a(5) of the Act, *supra*, which states, in relevant part, as follows:

> "Acts of bankruptcy by a person shall consist of his having . . . (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property. . . ."

Statement of the Case

The relevant and salient facts pertaining to the petition at bar are as follows:

1. Prior to September 21, 1970, Blair was engaged in the general brokerage and commission business, maintaining its principal place of business at 20 Broad Street, New York, New York. It was a registered broker-dealer and a member of the New York Stock Exchange ("Exchange") and other national securities exchanges (Pet. App. "A" at 11).

2. On or about April 3, 1970, Foley contributed to Blair a secured demand note collateralized by marketable securities in order to increase Blair's capital (93A-98A).* Foley's

---

* Numbers in parentheses followed by "A" refer to pages of the joint appendix filed by the parties with the Court of Appeals.

right to the return or withdrawal of the moneys and securities contributed to Blair was subordinated to the rights of all public customers and other creditors who had not also subordinated their rights and claims (Pet. App. "A" at 12).

3. In the early summer of 1970, Blair commenced a program of self-liquidation which involved the transfer of its customer accounts to other brokers or dealers and the delivery of securities as designated by customers. For the purposes of expediting the satisfaction of public customers' claims and to provide customer assistance, if necessary, Blair entered into an agreement with the Exchange on September 21, 1970. That agreement provided, *inter alia*, that the Exchange would have the right to appoint a "Liquidator" in the event that the trustees of the Exchange's Special Trust Fund made a loan to or guaranteed any obligation of Blair (32A-63A).

4. The Exchange's Special Trust Fund was established in 1964 to (a) provide public customer assistance, where appropriate, in the case of a financially distressed member organization and thus alleviate the hardship which might otherwise be incurred by public customers if such member organization became involved in a bankruptcy proceeding; and to (b) avoid a loss of confidence on the part of public customers in the securities market (Pet. App. "A" at 12).

5. On September 25, 1970, the trustees of the Special Trust Fund made an initial advance to Blair. Pursuant to the terms of the agreement dated September 21, 1970, the Exchange appointed Patrick E. Scorese as Liquidator for Blair. Mr. Scorese was appointed for the purpose of assisting Blair's public customers through the use of advances

from the Special Trust Fund and to implement the program of liquidation previously adopted by Blair's management. The Liquidator was given authority and power by Blair's board of directors to act for and on behalf of Blair in connection with its assets and properties (46A-63A).

6. On September 29, 1970, Foley filed with the District Court an involuntary petition in bankruptcy against Blair (Pet. App. "A" at 13).

7. At the time of the filing of the involuntary petition in bankruptcy, Blair had approximately 28,000 customer accounts and held more than $75,000,000 in securities, approximately $40,000,000 of which, including those of customers, were pledged with banks as collateral for loans approximating $30,000,000 (Pet. App. "A" at 11).

8. All advances from the Special Trust Fund to Blair ceased upon the filing of the involuntary petition in bankruptcy (Pet. App. "A" at 13).

9. Blair interposed an answer to the involuntary petition in bankruptcy on October 9, 1970, which denied the material allegations thereof and contained an application for a trial by jury pursuant to Section 19 of the Bankruptcy Act, 11 U.S.C. §42. Thereafter, Blair moved in the bankruptcy court for summary judgment dismissing the petition and Foley cross-moved for summary judgment adjudging Blair a bankrupt (Pet. App. "A" at 13).

10. By decision dated April 13, 1971, the referee in bankruptcy denied Blair's motion, granted the cross-motion and held, in part, that Blair's consent to the appointment of

Mr. Seoresc constituted the commission of the fifth act of bankruptcy under Section 3 of the Act (Pet. App. "C" at 28). On April 15, 1971, Blair filed a petition for an arrangement under Chapter XI, Section 321 of the Bankruptcy Act, 11 U.S.C. §721. As a consequence, the referee's order adjudging Blair a bankrupt (234A-235A), dated April 27, 1971, stayed all proceedings thereon subject to the further order of the referee assigned to the Chapter XI proceedings.

11. On May 7, 1971, a petition for review of the referee's order of April 27, 1971 was filed in accordance with Section 39c of the Bankruptcy Act, 11 U.S.C. §67 (229A-236A).

12. By opinion and order dated March 15, 1972, District Judge Irving Ben Cooper confirmed the order of the referee in bankruptcy (Pet. App. "B" at 25).

13. On December 11, 1972, the Court of Appeals reversed the order of the District Court with instructions to direct the referee to vacate the order of adjudication and dismiss the involuntary petition in bankruptcy (Pet. App. "A" at 22). The Court of Appeals found that the referee and the District Judge "erred in concluding that Blair had committed the fifth act of bankruptcy" (Pet. App. "A" at 14).

ARGUMENT

I.

A Liquidating Agent Is Not a "Receiver" or "Trustee" Within the Meaning of Section 3a(5) of the Bankruptcy Act.

Foley argues in the petition for certiorari that because Blair gave the Liquidator broad powers, the Court of Appeals "indulge[d] in meaningless semantics, and . . . consider[ed] form greater than substance" when it distinguished a consensually appointed liquidating agent from a receiver or trustee (Pet. at 8).* To support this contention, Foley relies upon the opinions of the referee in bankruptcy (Pet. App. "C") and the District Judge (Pet. App. "B") that "any difference between a Court-appointed Receiver and a privately selected liquidator did not warrant a distinction in the legal effect thereof, insofar as each constitutes an act of bankruptcy within the intent of §3(a)(5) [sic]." Neither the District Judge nor the referee cited any authority for that proposition. Moreover, neither the District Judge nor the referee analyzed the legal meaning and significance of the terms "receiver" and "trustee", as did the Court of Appeals.

The court below correctly determined that the Liquidator did not meet the usual requirements "essential to the status of a receiver, namely, appointment by a court" (Pet. App. "A" at 15). While Foley disregards such a distinction, it is undisputed that the Liquidator was consensually appointed

---

* References in parentheses to "Pet." refer to pages of the petition for certiorari.

and *not* appointed by a court. As this Court noted in *Booth* v. *Clark*, 58 U.S. (17 How.) 322, 331 (1855),

> "A receiver is an indifferent person between parties, *appointed by the court* to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. [Citations omitted]. *He is an officer of the court;* his appointment is provisional. . . . The money in his hands is in *custodia legis* for whoever can make out a title to it. [Citations omitted.] *It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as conferred upon him by the order of his appointment and the course and practice of the court.*" [Emphasis supplied.]

Accord, High, A Treatise on the Law of Receivers, ch. 1, §1, at 2-3 (4th ed. 1910).

Foley's petition for certiorari also ignores the established principle that a receiver "is the agent only of the court appointing him." *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F. 2d 147, 150 (4th Cir. 1944). In the *Ledbetter* case, *supra*, the plaintiffs contended that a receiver appointed by a state court in a mortgage foreclosure proceeding acted as the agent and representative of the mortgagees in wrongfully dealing with the receivership property. Affirming the lower court's dismissal of the complaint, the Court of Appeals for the Fourth Circuit held that the receiver was not the agent of the mortgagees, but was the agent only of the court which had appointed him, reasoning as follows:

> *"It is well recognized that a receiver is the agent only of the court appointing him; he represents the court rather than the parties. He is custodian of*

property which is under the control of the court. See 23 R.C.L.—Receivers §2, p. 7. The appointment of a receiver is a judicial act. It is not a matter of positive right, but rests in the sound legal discretion of the appointing judge. Suggestions as to the person to be appointed as receiver do not have the legal effect of making the receiver the agent of the party making the suggestion. Citations omitted.] [The court then quoted this Court's definition of 'receiver' quoted above in *Booth* v. *Clark, supra.*] Though a receiver appointed by the court acts for all parties interested, he is not the agent of the parties in the sense that each or any of the parties is responsible for his acts. . . ." 142 F. 2d at 150. [Emphasis supplied.]

Therefore, the Court of Appeals was correct in reasoning that, since a receiver is not, without more, an agent, so an agent with broad powers such as the Liquidator, is not, without more, a receiver (Pet. App. "A" at 16). The Liquidator was not court-appointed and consequently cannot be deemed an officer of any court, for, as the Court of Appeals correctly noted, Blair executed an instrument on September 21, 1970 which described the Liquidator as "the true and lawful attorney and agent of and for [Blair]." (Pet. App. "A" at 13).

Similarly, the court below correctly held that the Liquidator lacked one element essential to the normal concept of trusteeship, namely, legal title to the property of Blair (Pet. App. "A" at 16).

> "An agent does not ordinarily have title to the property of the principal, although he may be entrusted with possession and although he may have power to pass title; *but a trustee has title to the trust property.*" [Emphasis supplied.]

Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3rd ed. 1967); see *Handy* v. *C.I.T. Corp.*, 291 Mass. 157, 197 N.E. 64 (1935); Restatement of Trusts 2d, §§ 2 and 8 & comment *a.* (1959).

This Court has also stated that

> "[a] trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." *Taylor* v. *Davis' Adm'x.*, 110 U.S. 330, 334 (1884).

While the Liquidator, as Blair's agent, could subject Blair to liability for his acts, a trustee would ordinarily not have such power. *Scott*, The Law of Trusts, ch. 1, § 8, at 74 (3rd ed. 1967). Foley has not, and indeed cannot, point to any document which vested the Liquidator with title or any other interest in the property of Blair.

Relying only upon *In re R. V. Smith Co.*, 38 F. Supp. 57 (W.D. Okla. 1941), Foley contends that the decision of the Court of Appeals "is a distinct and abrupt departure from everything that has been written on the question involved on this appeal" (Pet. at 6). In fact, the issue of whether an insolvent debtor's consent to the appointment of a non-statutory, non-court appointed liquidating agent constitutes the commission of the fifth act of bankruptcy has not been squarely dealt with by any court, although the court in the *Smith* case, *supra*, did treat the subject obliquely. There, the petitioning creditors alleged that the debtor's consent to the appointment of "liquidating trustees" constituted an assignment for the benefit of credi-

tors, the fourth act of bankruptcy. Section 3a(4) of the Bankruptcy Act, 11 U.S.C. §21a(4). The court stated initially it was "not at all satisfied that even under the Act and under the construction that has been placed on similar acts by Federal Courts, the instruments executed . . . did not constitute an assignment for the benefit of creditors," even though title was not expressly conveyed to the liquidating trustees. 38 F. Supp. at 62. But see *In re Ambrose Matthews & Co.*, 229 Fed. 309 (D.N.J. 1916), *aff'd* 236 Fed. 539 (3d Cir. 1916). While the court in the *Smith* case merely stated that the alleged bankrupt had committed the fifth act of bankruptcy, it did not indicate whether or not any defense was interposed to the alleged commission of such act. Moreover, the court gave no consideration whatsoever to the derivation of Section 3a(5) or the legislative intent underlying the adoption of that section. Consequently, it is submitted, and the Court of Appeals found, that the reasoning of the *Smith* case, *supra*, is not at all persuasive (Pet. App. "A" at 17). In any event, the *Smith* decision was not binding on the Court of Appeals and has not been cited for any purpose in a reported opinion during the thirty years since it was rendered.

As with the fourth act of bankruptcy, the debtor's making of a general assignment for the benefit of his creditors, the fifth act of bankruptcy has the effect of preventing creditors from pursuing their ordinary remedies against the debtor. When either the fourth or fifth acts of bankruptcy are committed, creditors have to deal with the debtor's assignee, receiver or trustee. In contrast, after the appointment of the Liquidator, Blair's creditors could have proceeded against the debtor's property and assets to enforce any judgments which they might have obtained. Further,

Blair's creditors would have the right to prosecute their claims in the court of their own choosing, a valuable right to such creditors, most of whom are spread throughout the country. Finally, unlike the ordinary assignment, receivership or trusteeship contemplated by the fourth and fifth acts of bankruptcy, Blair's creditors would not be relegated to a pro rata distribution of the debtor's assets in a formal proceeding.

As the court below correctly noted, Congress determined that an insolvent debtor's placing of such obstacles as an assignment for the benefit of creditors, receivership or trusteeship in the way of his creditors should enable those creditors to choose their own trustee in a formal bankruptcy proceeding. See *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 10 Fed. Cas. 488, 492 (No. 5486) (C.C.N.D. Ohio 1876) *appeal dismissed*, 98 U.S. 366 (1879).

A corporate debtor which merely grants a power of attorney for the purpose of winding up its affairs has not made an assignment for the benefit of its creditors, and has thus not committed the fourth act of bankruptcy. *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd* 236 F. 539 (3d Cir. 1916). As the court reasoned in *Ambrose Matthews, supra*,

> "It is necessary primarily, therefore, to construe this instrument [i.e. the power of attorney] and to ascertain its legal effect as respects the property of the alleged bankrupt. It does not contain any words of conveyance, assignment or transfer. It merely appoints two persons as 'agents, attorneys and trustees' for the stockholders, directors and corporation 'for the purpose of winding up the affairs' of the corporation. It empowers them to collect the corporation's outstanding accounts, to pay its debts, to prosecute

and defend suits for and against it, to convey and dispose of its property, and after payment of its debts to divide its assets among the stockholders; also, to prepare the necessary papers for the dissolution of the corporation immediately after its accounts have been settled; and, generally, it sought in terms to confer upon them all of the powers and to impose all of the liabilities of a board of directors in winding up the affairs of a corporation upon dissolution. It seems entirely clear that it conferred no title whatever to any of the corporation's property upon the trustees. Its effect was merely to clothe the trustees with certain powers regarding the disposition of the corporation's assets and the distribution of the same among its creditors and stockholders. Nor can I find that there was any intent on the part of the alleged bankrupt to confer title upon the trustees. Each of the latter were attorneys at law, and the purpose of the instrument was that they, who were presumably better qualified, rather than the directors, should wind up the affairs of the corporation. *As the instrument brought about no change in the title to the property, either absolute or conditional, nothing was conveyed or transferred by it, and it could not hinder, delay or defraud creditors, because any creditor could proceed to satisfy his claim from the corporation's property to the same extent as though the instrument did not exist.*" 229 F. at 310. [Emphasis supplied.]

The reasoning of the foregoing decision is directly applicable to the case on appeal, for if the debtor's granting of such a power of attorney does not constitute the fourth act of bankruptcy, then it should not constitute the fifth act, particularly when the rights of creditors are in no way affected thereby. Accordingly, the court below was entirely correct in holding that the Liquidator was not the equivalent of a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act.

Similarly, Foley's reliance upon *In re Watts & Sachs*, 190 U.S. 1 (1903) is misplaced. There, this Court held that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up *under state statutes*." 190 U.S. at 27. [Emphasis supplied.] In *Watts & Sachs* this Court was construing the predecessor to Section 3a(5), which provided that an act of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States." In fact, the receiver in that case had been appointed by a state court prior to the commencement of the bankruptcy proceedings. Since the Liquidator of Blair was not appointed pursuant to statute or any judicial proceeding, the *Watts & Sachs* decision is easily distinguishable from the case on appeal.

II.

The Legislative History and Statutory Context of Section 3a(5) of the Bankruptcy Act Establishes That an Agent Appointed to Liquidate Is Not Within the Purview of That Section.

The legislative history and statutory context of Section 3a(5) of the Bankruptcy Act do not reveal a Congressional intent to include a consensually appointed liquidating agent within the coverage of said section. Foley significantly avoids any express reference to the legislative history of said section and does not in any way refute the extensive historical analysis set forth in the opinion of the Court of Appeals (Pet. App. "A" at 17-20).

The court below noted that the present Section 3a(5) has its derivation in the Bankruptcy Act of 1898, ch. 541, §1 *et seq.*, 30 Stat. 545. In the original statute, the appointment of a receiver or trustee was not deemed to be an act of bankruptcy, but several courts nevertheless treated such an appointment as the equivalent to a general assignment for the benefit of creditors, the fourth act of bankruptcy. *Scheuer* v. *Smith & Montgomery Book & Stationery Co.*, 112 F. 407 (5th Cir. 1901). The majority of courts, however, ruled otherwise. *In re Burrell*, 123 F. 414 (2d Cir. 1903).

Because of the conflicting decisions, the fourth act of bankruptcy was amended in 1903 to provide that an act of bankruptcy was committed if the alleged bankrupt " . . . made a general assignment for the benefit of creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee had been put in charge of his property *under the laws of a State, or a Territory, or of the United States.*" Act of February 5, 1903, 32 Stat. 797. [Emphasis supplied.] Thus, the 1903 statutory amendment created a new act of bankruptcy intended to cover those cases where a receiver or trustee was appointed *pursuant to a statute or judicial proceeding.*

As the court below correctly noted (Pet. App. "A" at 18), the 1926 amendment to Section 3a was intended only to clarify the definition of the term "insolvency" contained in said section. H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926); H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926). While the 1926 amendment to the section deleted the words "under the laws of a State, of a Territory, or of the United States", the House Report and analysis of the proposed changes indicates that no substantive change was intended

to be brought about by such deletion. In fact, the Senate bill, S. 1039, retained these words, 67 Cong. Rec. 6800 (1926), but, in conference, the words were subsequently stricken, the House managers stating that the "difference consists merely in phraseology." H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). Hearings in the House of Representatives also demonstrate that the deletion of the aforesaid language was not meant to be a substantive change. See Hearings pursuant to H. Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51, at 38-39 (1925); Hearings on H.R. 5221 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926).

In view of the authorities previously cited herein, there can be no doubt that the deleted language was surplusage, for a receiver would necessarily be appointed pursuant to a statute or by a court and a trustee would also be so appointed or would be an assignee for the benefit of creditors under the fourth act of bankruptcy. Moreover, if an insolvent debtor had transferred its assets to an individual otherwise than for the benefit of all its creditors, the transaction would either be a fraudulent conveyance or a preferential transfer under the first and second acts of bankruptcy.

Section 3a(5) was further amended in 1933 to read in its present form, which is not limited to the bankruptcy definition of involvency. See 1 *Collier*, Bankruptcy ¶3.501 at 496 (14th Ed. 1971). The Senate Report indicates that the purpose of the amendment was to broaden the scope of the fifth act of bankruptcy "in order to reach the widely prevalent abuse of collusive equity receiverships." S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938); see also H.R. Rep.

No. 1409, 75th Cong., 1st Sess. 6 (1937). The collusive equity receiverships to which Congress had directed its attention involved judicially appointed receivers and *not* consensually appointed liquidating agents. See, e.g., *First National Bank* v. *Flershem*, 290 U.S. 504 (1934).

Further evidence that Congress never intended the words "receiver" or "trustee" to include a consensually appointed liquidating agent can be found by comparing Section 3a(5) with Section 2a(21) of the Bankruptcy Act, which section authorizes the bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property" to deliver the property in their possession or control to a representative of the bankruptcy court. Section 2a(21) was added in 1938, 52 Stat. 844, at the same time Section 3a(5) was amended. It is readily apparent, therefore, that when Congress intended to include a consensually appointed liquidating agent within a specific provision of the statute, it expressly referred to such an agent. Since Section 3a(5) contains no such reference, the inevitable conclusion is that a consensually appointed liquidating agent does not fall within the coverage of the fifth act of bankruptcy.

Congress also amended Section 69d of the Act in 1952 so as to provide that upon the filing of a petition, "a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt" shall be accountable to the bankruptcy court for action taken after the filing of the petition, shall file a

schedule of assets and liabilities, shall make a sworn statement of his administration of the estate, and shall not make any disbursements or take other administrative action without authorization from the bankruptcy court. 66 Stat. 426. The 1952 amendment to Section 69d was made for the express purpose of including assignees for the benefit of creditors and liquidating agents within its coverage, as explained by the House Committee:

> "[The amendment] conforms the scope of Section 69d of the Act to that of Section 2a(21). Section 2a(21) gives the court jurisdiction to require receivers or trustees, appointed in proceedings not under the Act, as well as assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control to a receiver or trustee appointed under the Act. Section 69d, spelling out that power, requires a receiver or trustee, not appointed under the Act, of any property of the bankrupt, to account to the bankruptcy court, *but does not include the assignee and agent. The bill adds the necessary language and clarification.*" [Emphasis supplied.]

H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952).

The foregoing excerpts amply demonstrate that Congress never intended the terms "receiver" or "trustee" to include a consensually appointed liquidating agent. When Congress thought it necessary to bring a liquidating agent within the coverage of the statute, appropriate amendments were made, but no such amendment was ever made or proposed, however, for Section 3a(5). As this Court has previously stated, "where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton* v.

Rathbone, 175 U.S. 414, 419 (1899). Moreover, the relevant and undisputed legislative history demonstrates that Congress deliberately excluded the appointment of a liquidating agent from the coverage of Section 3a(5).

III.

The Petition for Certiorari Does Not Present a Question of Great Public Concern.

Petitioners allege that the question presented "is of great public concern . . . ", (Pet. at 5) allegedly because an insolvent broker-dealer, such as Blair, would be able to defeat bankruptcy proceedings by appointing a liquidating agent (Pet. at 8). The Petitioners are egregiously wrong. First, the Bankruptcy Act specifies six acts of bankruptcy. The commission of any one of those acts could serve as the basis for an involuntary adjudication in bankruptcy, notwithstanding the appointment of a liquidating agent.

Secondly, the Petitioners completely ignore the enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa, *et seq.* Said Act effectively resolves the question presented herein. The insolvency of a registered broker or dealer will subject it to proceedings under the supervision of the Securities Investor Protection Corporation and the provisions of that Act.

Section 5(b)(1)(A) of the aforesaid Act, 15 U.S.C. §78eee(b)(1)(A), expressly provides that, upon application of the Securities Investor Protection Corporation, a United States District Court may determine that customers of a broker-dealer are entitled to the benefits of said Act if such member

"(i) is insolvent within the meaning of section 1(19) of the Bankruptcy Act, or is unable to meet its obligations as they mature, or (ii) has committed an act of bankruptcy within the meaning of section 3 of the Bankruptcy Act, or (iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or (iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or (v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations."

Because it is undisputed that Blair was insolvent within four months of the filing of the involuntary petition in bankruptcy, there is no question that Blair falls within the terms of the foregoing excerpt and that the benefits of the Securities Investor Protection Act would have been available to Blair's customers if said statute were not prospective. See *Lohf* v. *Casey*, 330 F.Supp. 356 (D. Colorado 1971); H.R. Rep. No. 1613, 91st Cong., 2d Sess. 14 (Oct. 21, 1970). In any event, however, the issue raised by the petition for certiorari will not arise in the future as to stockbrokers. Accordingly, it is submitted that the question presented is not an important matter of federal law which warrants review by this Court.

IV.

Section 3a(5) of the Bankruptcy Act Is Specific and Should Not Be Judicially Enlarged.

The court below correctly noted (Pet. App. "A" at 20) that Foley disregarded the legal significance of the terms "receiver" and "trustee" contained in Section 3a(5) of the Bankruptcy Act, as well as the legislative history of said section, on the grounds of policy. Foley also disregarded the particularity with which the acts of bankruptcy are enumerated in Section 3. Unless described by Section 3, however, no action by an insolvent debtor can precipitate an involuntary bankruptcy proceeding. 1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1971). Moreover, it is well established that "when acts of bankruptcy are classified . . . it is not the province of the court to enlarge the classification. . . ." *In re Empire Metallic Bedstead Co.*, 98 F. 981, 982 (2d Cir. 1899).

> "[T]his statute (while remedial) should be construed strictly. . . . In other words, its scope should not be enlarged so as to include transactions that may appear to be analogous but are obviously not contemplated by the statute. A court of bankruptcy has no power to extend the Bankruptcy Act. . . ."

Maplecroft Mills v. *Childs*, 226 F. 415, 419 (4th Cir. 1915).

Foley suggests that the effect of the Court of Appeals' decision would be to deny to creditors "the right to select their own trustee to control a liquidation" (Pet. at 7). It is undisputed, however, that Blair's creditors were not prevented from alleging any of the other acts of bankruptcy, namely, a fraudulent conveyance, a preferential transfer,

or the debtor's failure to vacate or discharge a lien, in order to subject Blair to involuntary bankruptcy during the Liquidator's tenure, if the facts had warranted it. Furthermore, as previously demonstrated, Blair's creditors were in fact denied none of their rights against Blair when the Liquidator was appointed. Accordingly, the case of *In re Bonnie Classic, Inc.*, 116 F. Supp. 646 (S.D.N.Y. 1953), relied upon by the referee and the District Court is inapposite. In that case, the directors of the corporation became *statutory* trustees under New York law, acquired title to as well as possession of the debtor's property and were vested with injunctive powers against creditors of the debtor.

Foley's suggestion that the holding of the court below would deprive the bankruptcy court of exclusive jurisdiction over the Blair estate also ignores Blair's filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act on April 15, 1971. By virtue of Section 311 of the Act, 11 U.S.C. §711, Blair became subject to the bankruptcy court's "exclusive jurisdiction" (Pet. App. "A" at 13-14). Proceedings in ordinary bankruptcy have been stayed pursuant to Section 325 of the Act (Pet. App. "A" at 14) and Blair is rapidly proceeding toward confirmation of its proposed arrangement, the requisite majority in number and amount of creditors' acceptances having been obtained.

In view of the foregoing, no rational basis for a judicial enlargement or modification of the acts of bankruptcy, as suggested by Foley, has been advanced. As recently noted by Chief Justice Burger of this Court,

> "the bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since

many debtors work out binding private adjustments with creditors."

United States v. *Kras*, —— U.S. ——, 93 S.Ct. 631, 640 (1973) (concurring opinion). Accordingly, the Court of Appeals was entirely correct in construing what Congress enacted and in not eliminating the act of bankruptcy requirement as a condition to an involuntary adjudication.

V.

No Sound Reason Exists for the Granting of the Petition for Certiorari.

The decision of the Court of Appeals represents the only reported decision of an appellate court as to the precise question involved herein. The decision is in accord with the legislative history and plain language of the statute. The Court of Appeals found that Mr. Scorese as a Liquidator "did not meet what is usually regarded as essential to the status of a receiver, namely, appointment by a court." (Pet. App. "A" at 15). The court also determined that Mr. Scorese "lacked one element essential to the normal concept of trusteeship, namely, legal title to the property." (Pet. App. "A" at 16).

As hereinabove stated, the Court of Appeals has not decided an important question of federal law which should be settled by this Court. The decision below involved elementary and established rules of statutory construction. Indeed, even the dissenting opinion below noted that the "approach of the majority cannot be said to be an unreasonable one." (Pet. App. "A" at 24).

In essence, Petitioners herein seek to involve the Court in an academic debate concerning the construction of pro-

visions of the Bankruptcy Act, which, thus far, have not given rise to any conflicting decisions between the judicial circuits. As stated in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955), "... this Court does not sit to satisfy a scholarly interest .... Nor does it sit for the benefit of particular litigants."

The petition herein is sought only for the peculiar benefit of Foley and is not sought to settle any real conflict of opinion and authority. Therefore, there exists no sound reason which would favor the issuance of a writ of certiorari to the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES SELIGSON
Attorney for Respondents
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

WEIL, GOTSHAL & MANGES,
MUDGE ROSE GUTHRIE ALEXANDER & MITCHELL,
HARVEY R. MILLER,
MICHAEL L. COOK,
Of Counsel.

March 16, 1973